IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

COUNTY OF VENTURA APPELLANT,

v.

O. V. BLACKBURN APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR APPELLANT

FILED

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> County of Ventura Courthouse Ventura, California



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INDEX

				Pag		
	JURISDIC	1				
	STATEMEN	STATEMENT OF THE CASE				
	SPECIFIC	SPECIFICATION OF ERRORS				
	QUESTION	6				
	SUMMARY	OF A	ARGUMENT	7		
	I	NOT CREA	CKBURN'S MAP OF VENTURA COUNTY DOES CONTAIN SUFFICIENT ORIGINAL AND ATIVE WORK TO BE COPYRIGHTABLE UNDER LAW OF THE UNITED STATES.	8		
	II	THE NOT COPY COUNTHE RIGH	REPRODUCTION AND SALE OF COPIES OF MAP WITHOUT COPYRIGHT NOTICES DID CONSTITUTE AN INFRINGEMENT OF THE WRIGHT BY THE COUNTY BECAUSE THE NOTY WAS NOT OBLIGATED UNDER EITHER CONTRACT WITH BLACKBURN OR COPYHT LAW TO AFFIX COPYRIGHT NOTICES EACH COPY.	12		
;		Α.	The Court Erroneously Assumed That the County Was Obligated to Affix the Copyright Notices Unless Blackburn Expressly Waived His Copyright or Unless There Was Very Strong Evidence That He Intended to Destroy It.	14		
)		В.	The Copyright Act Does Not Impose Upon the County the Duty or Obligation to Affix Copyright Notices to Each Copy of the Map Reproduced by the County.	16		
3		С.	The Agreement Between Blackburn and the County Under Which the County Reproduced Copies of the Map Does Not Impose Upon the County the Duty or Obligation to Affix a Notice of Blackburn's Copyright to Each Copy.	18		

<u>-i</u>



		rage			
	 The agreement is absolutely silent as to any duty or ob- ligation to affix copyright notices to each copy of the map. 	19			
	2. A promise to affix copyright notices will not be implied against the County so as to make the County liable for damages for infringement of copyright.	21			
DAM THE CAU	DISTRICT COURT AWARDED EXCESSIVE AGES BY FAILING TO PROPERLY DETERMINE AMOUNT OF THE DAMAGE WHICH WAS SED BY THE FAILURE OF THE COUNTY TO TX COPYRIGHT NOTICES.	26			
Α.	The Primary Cause of the Loss in Value of the Copyright Was the	29			
	Fact that Blackburn on July 17, 1956, Sold to the County the Right				
	to Reproduce and Sell Copies of the Map to the Public Without any Restrictions as to the Prices to be Charged, the Payment of Periodic Royalties, the Geographic Territory, or the Duration of the Rights.				
В.	The Value of the Copyright was Greatly Decreased by the Fact that the Copies of the Map Sold by the County Under the Agreement of July 17, 1956, Were Current and Up to Date Whereas the Copies Sold by Blackburn Were Not Up to Date.	32			
C.	The District Court Should Have Awarded the Statutory Damages in Lieu of Actual Damages Because There Was no Evidence of the Amount of Actual Damage Which Was Caused by Any Infringement of the County.	33			
CONCLUSION		37			
AGREEMENT BETWEEN BLACKBURN AND COUNTY App					
TABLE OF EXHIBITS Ap					

1 2 3

1 2

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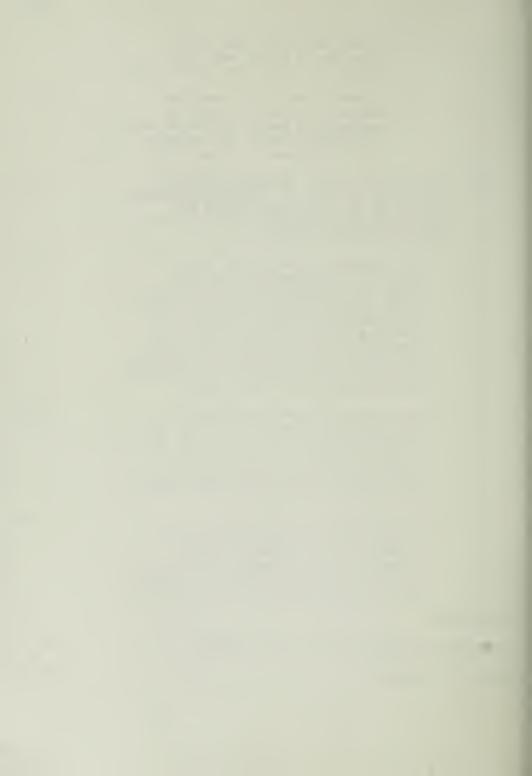


TABLE OF CITATIONS

2		PAGES
3	CASES	
4	Amsterdam v. Triangle Publications, 189 F.2d 104 (3rd Cir. 1951)	7, 11
6	April Productions v. G. Schirmer, Inc., 308 N.Y. 366, 126 N.E. 2d 283 (N.Y.Ct.App. 1955)	24
8	Axelbank v. Rony, 277 F.2d 314 (9th Cir. 1960)	7, 10
9	Christianson v. West Pub. Co., 149 F.2d 202 (9th Cir. 1945)	10
1	Consumers Union of the United States v. Hobart Mfg. Co., 189 F. Supp. 275 (SDNY 1960)	26
3	Johnston v. 20th Century-Fox Film Corp., 82 Cal.App.2d 796, 187 P.2d 474 (1947)	23
4 5	<pre>Kirke La Shelle Co. v. Paul Armstrong Co., 263 N.Y. 79, 188 N.E. 163 (N.Y.Ct.App. 1933)</pre>	22
.7	Manners v. Morosco, 252 U.S. 317, 40 S.Ct. 335, 64 L.Ed. 590 (1920)	22
.8	National Comics Publications v. Fawcett Publications, 191 F.2d 594 (2nd Cir. 1951)	7, 15, 17, 19, 21, 25
20	Orgel v. Clark Boardman Co., Ltd., 301 F.2d 119 (2d Cir. 1962)	27
22	Public Affairs Associates, Inc., v. Rickover, 284 F.2d 262 (D.C. Cir. 1960)	16
23 24	Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390, 60 S.Ct. 681, 84 L.Ed. 825 (1940)	27
25 26	Uproar Co. v. National Broadcasting Co., 81 F.2d 373 (1st Cir. 1936)	23
	-iii-	

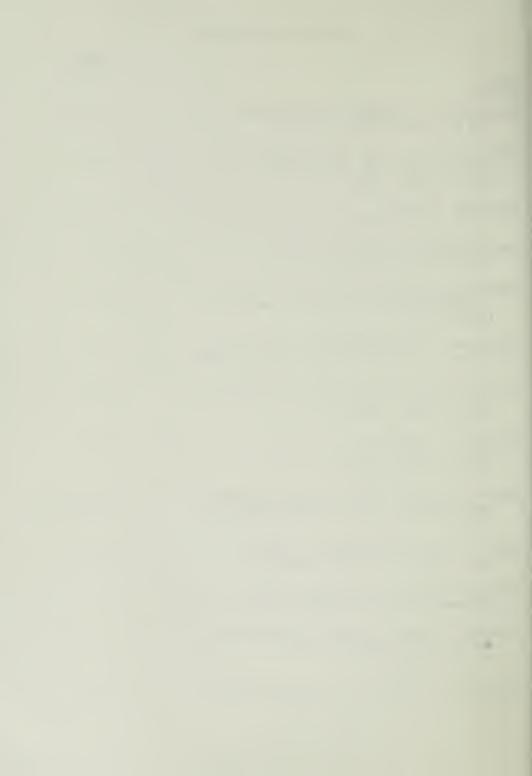


TABLE OF CITATIONS (Continued) PAGES STATUTES 17 U.S.C. 1 2, 29 17 U.S.C. 10 17 U.S.C. 101 2, 8, 26, 27

-iv-



IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 20275

COUNTY OF VENTURA, APPELLANT

V.

O. V. BLACKBURN, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a final judgment entered on May 17, 1965, by the United States District Court for the Southern District of California, Central Division, awarding O. V. Blackburn thirteen thousand one hundred dollars (\$13,100 damages from the County of Ventura for the infringement of a copyright in a map (R. 168-169). The underlying action was brought by O. V. Blackburn to recover damages and to obtain an injunction for copyright infringement. The District Court jurisdiction was invoked under 28 U.S.C. 1338 and 17 U.S.C. 101 (R. 2, 142, 160). The District Court held that O. V. Blackburn had a copyright in the map under the laws of the United States and that the County of Ventura had infringed that copyright by failing to affix a notice of Blackburn's



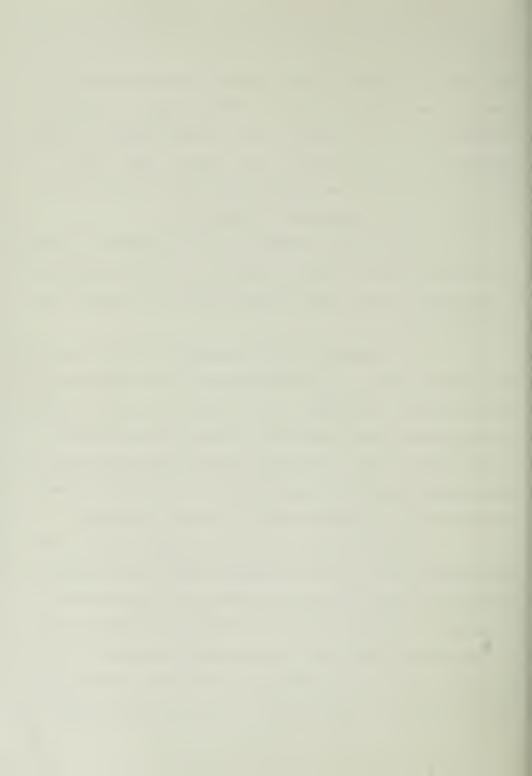
copyright to copies of the map reproduced by the County under an agreement with Blackburn (R. 164-165). Injunctive relief was denied (R. 166). A final judgment awarding damages to Blackburn was entered on May 17, 1965 (R. 168). The County of Ventura on June 11, 1965, filed a timely notice of appeal under 28 U.S.C. 2107 and 28 U.S.C. 1291 (R. 170). This Court's jurisdiction accordingly rests upon 28 U.S.C. 1291.

STATEMENT OF THE CASE

This is a suft brought by O. V. Blackburn to obtain an injunction and to recover damages for the infringement of a copyright in a map under section 101 of the Copyright Act. 17 U.S.C. 101.

O. V. Blackburn at some time prior to 1954 compiled and drafted a map of the southern part of the territory of Ventura County, California. All of the information depicted on the map was taken from public records and governmental sources (R. 144-145). In 1954 Blackburn published copies of the map with copyright notices affixed and thereby claimed protection of the Copyright Act. 17 U.S.C. 1, et seq.

On July 17, 1956, Blackburn and the County of Ventura entered into a written agreement under which Blackburn sold to the County of Ventura for the sum of one thousand nine hundred dollars (\$1,900) the right to reproduce copies of the map for its own use and for sale to the public at any price determined by the County (R. 5-6; P.Ex. 1; set out in full in appendix of this brief). Blackburn reserved the right



to continue to reproduce the map himself for sale. The agree-1 ment contained no provision for the payment of royalties of 2 any kind to Blackburn on sales by the County or for the affix-3 ing of copyright notices on maps sold. The agreement was negotiated with Blackburn by the County Surveyor (R. 62; D.Ex. B; R.Tr. 71) and was drafted by the office of the Ventura 6 County District Attorney (R. 143). All persons who participated in the actual negotiation of the agreement for the County were deceased at the time of the trial (R.Tr. 71). The mat-9 ter of copyright notices was not mentioned in either Black-10 burn's letter of May 5, 1956, offering to sell to the County 11 the right to reproduce copies of the map (D.Ex. B; R. 62) or 12 the July 17, 1956, agreement (P.Ex. 1; R. 5-6; appendix of 13 brief) and was not discussed by Blackburn with the County un-14 til after June 7, 1963 (R. 163). As a result of the July 17, 15 1956, agreement Blackburn furnished to the County photographic 16 negatives of the map from which linen tracings were prepared 17 by Reed and Company for the County (R. 143; R.Tr. 87-88; R. 18 163). Blackburn testified that the negatives provided to the 19 County for the preparation of the tracings did contain copy-20 right notices (R.Tr. 18-44). The linen tracings obtained by 21 the County did not contain copyright notices (R. 145, 163). 22 Maps sold by the County were made from these tracings. Maps 23 sold by the County up to June 1964 did not contain copyright 24 notices (R. 143). Since that time, while maintaining that it 25 had no obligation to do so, the County has affixed a copyrigh 26



notice to each copy of the map reproduced by the County (R. 143; R.Tr. 91, 98).

82).

Blackburn testified that the map cost seven thousand five hundred dollars (\$7,500) to prepare and that the value of the copyright on the map prior to entering into the contradivith the County was fifteen thousand dollars (\$15,000) (R.Tr. 50). Blackburn's witness Renie testified that the value of the map prior to the agreement with the County was from fifteen thousand dollars (\$15,000) to twenty thousand dollars (\$20,000) (R.Tr. 79-82). Both witnesses testified that at the time of the trial the copyright had no value (R.Tr. 50,

The copies of the map sold by the County contained

current information and were always within thirty days of being up to date (R.Tr. 92-93; R. 144). The copies of the map sold by Blackburn had not been up-dated since 1956 (R.Tr. 67-70). The County sold copies of the map for fifteen dollar (\$15) while Blackburn sold them for seventy dollars (\$70) (R.Tr. 66). Blackburn testified that before entering the contract with the County his sales averaged one thousand five hundred dollars (\$1,500) a year and thereafter decreased to four hundred fifty dollars (\$450) to two hundred fifty dollar (\$250) a year (R.Tr. 64). The County's sales during the stat utory period from October 1961 through June 1964 totaled three thousand eight hundred eighty-eight dollars (\$3,888) (R. 144). During this period the County sold ninety-six copies



of the complete map and one thousand nine hundred forty-eight (1,948) copies of separate parts of the map representing another sixty-eight (68) complete maps (R. 144). The County' sales increased by approximately fifty percent (50%) after the copyright notices were affixed in June 1964 (R.Tr. 91).

At the commencement of trial before taking testimon

The court further held that the only evidence in th

the court held as a matter of law that the map was copyrightable since the information on the map was copied from three of more sources (R.Tr. 8-9) and that since the subject matter of the agreement granting the right to reproduce copies of the map was a copyrighted instrument the County has an obligation as a matter of law to affix a copyright notice unless Blackburn clearly intended to destroy the copyright (R.Tr. 12, 14)

record as to the value of the copyright was the testimony that the copyright was worth fifteen thousand dollars (\$15,00 before the July 17, 1956 agreement and was worth nothing at the time of trial (R.Tr. 111-112), and that therefore damages were fifteen thousand dollars (\$15,000) less the one thousand nine hundred dollars (\$1,900) paid under the July 17, 1956 agreement.

[[]]]]]]]



- 1. The District Court erred in holding that Blackburn's map is copyrightable as a matter of law.
- 2. The District Court erred in holding that the County is obligated as a matter of law to affix copyright notices to every copy of the map reproduced by the County under the contract with Blackburn.
- 3. The District Court erred in finding that the damages to Blackburn due to the infringement by the County were in the amount of thirteen thousand one hundred dollars (\$13,100) in that the Court failed to apportion the amount of damages caused by the absence of copyright notices and the amount of damages caused by other factors.

QUESTIONS PRESENTED

- 1. Whether a map compiled entirely from information taken from public records and governmental sources is copyrightable as a matter of law where the information depicted on the map was copied from three or more sources.
- Whether the owner's claim of a copyright in a map which is the subject matter of an agreement imposes an obligation to affix copyright notices on copies of that map as a matter of law upon the purchaser of the unrestricted rights under the agreement of reproduction, use and sale of copies of the map.



3. Whether one who has the unrestricted right to reproduce, use and sell copies of a map without payment of royalties to the claimant of a copyright is liable in damages for the entire diminution in value of the copyright over a period of years for failure to affix copyright notices to copies of the map.

9.

SUMMARY OF ARGUMENT

Blackburn's map is not copyrightable as a matter of law merely because the information depicted on the map was gathered from three or more sources and put together on one piece of paper. Under Amsterdam v. Triangle Publications, 189 F.2d 104 (3rd Cir. 1951); Axelbank v. Rony, 277 F.2d 314 (9th Cir. 1960); and related cases a high degree of creativity and originality on the part of the map maker is necessary to secure a copyright on a map. Copying and compiling information from various sources is not sufficient original and creative work to make a map copyrightable.

The County is under no obligation to affix copyrigh notices to every copy of the map reproduced by the County under the agreement with Blackburn. In National Comics Publications v. Fawcett Publications, 191 F.2d 594 (2nd Cir. 1951), Judge Learned Hand says that if the copyright proprietor does not exact a promise from the licensee to affix copyright notices to every copy reproduced by the licensee, the licensee may publish copies as it chooses, either with or without copyright notices affixed. The written contract is



the only agreement between Blackburn and the County and it contains no mention whatsoever of copyright notices. The Copyright Act does not place a mandatory duty on the County to affix copyright notices. The law will not construct against the County an implied promise to affix copyright notices for the sole purpose of making the County an infringer of copyright and liable to Blackburn for damages.

Even if the copyright on the map is valid and the 8 County is liable for infringement, the damages awarded were 9 excessive because they were not apportioned so that the Count 10 must pay only the amount of damages which was caused by the 11 absence of copyright notices. Under 17 U.S.C. 101 the in-12 fringer is liable to pay the proprietor only such damages as 13 were suffered due to the infringement. The major cause of 14 the loss in the value of the copyright was Blackburn's sale t 15 the County of the right to reproduce and sell copies of the 16 map to the public at prices to be determined by the County. 17 The District Court did not properly determine the amount of 18 damages caused by the absence of the copyright notices. 19

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BLACKBURN'S MAP OF VENTURA COUNTY DOES NOT CONTAIN SUFFICIENT ORIGINAL AND CREATIVE WORK TO BE COPYRIGHTABLE UNDER THE LAW OF THE UNITED STATES.

At the outset of the trial, the District Court held that the map compiled by Blackburn contained sufficient creativity to be copyrightable.



The Court had not looked at the map and the only evidence on the issue of originality and creativity was contained in the Pretrial Conference Order (R. 144-145) where it was admitted that Blackburn had taken all of the information and data depicted on his map from government maps, the County Assessor's records, aerial photographs, U.S. Government topographical maps and other sources. There was no evidence of any effort or creativity by Blackburn in making his map other than copying from these sources.

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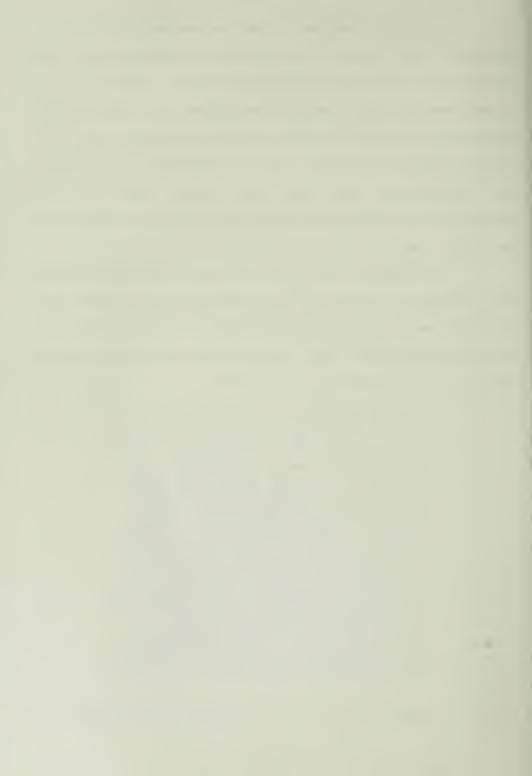
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In answer to the County's suggestion that the question was what if anything did Blackburn do to create a copyrightable map in addition to merely extracting information from public records, other governmental sources and copying other maps, the District Court stated:

"I do not mean to be abrupt with you, counsel, but I don't agree with you at all. I think every lawyer who has had any experience at all, or anybody who tries to find the city boundary of . . Oak View, you can go to the geological survey of the United States, which is now in Denver, and you can go to the county recorder's office and the city recorder's office and you will probably go back to the old land office maps . . . in Sacramento -- so in order to be able to get the proper boundaries of Oak View in relation to some public property you would have to go to Denver, to Sacramento and to Ventura today. So I will hold that it is creativity for somebody to put all that information together on one piece of paper. So that disposes of that law issue." (R.Tr. 8-9.)

Apparently the Court held that in order to extract



the necessary information from public records and other governmental sources it would be necessary for Blackburn to go to Denver, Sacramento and Ventura and that going to these three sources of information and putting "all that informatio together on one piece of paper" was sufficient creativity to make the map copyrightable.

It should be noted that there is no evidence in the record that Blackburn actually went to the three sources mentioned by the Court.

The Court's conclusion of law based on the assumption of the three sources is not supported by the cases.

As this Court stated in Axelbank v. Rony, 277 F.2d 314, 318 (9th Cir. 1960):

"[I]t is well settled that maps as such are entitled to limited copyright protection .
... We are unable to say as a matter of law that the appellant's [map] involved such a high degree of creation that even if copied by Rony it constituted an infringement of appellant's copyright."
(Emphasis added.)

Under this principle it seems clear that copying from three of more sources does not involve such a high degree of creation as to make Blackburn's map copyrightable as a matter of law.

In <u>Christianson v. West Pub. Co.</u>, 149 F.2d 202, 203 (9th Cir. 1945) this Court held that an outline map of the United States with state boundaries is in the public domain and is not copyrightable. All of the information depicted or Blackburn's map is available to the public from other sources



(R. 145) and therefore is "in the public domain". All Black-burn did was to assemble, prepare, collate and compile the information from the public domain. Under the cases that is not enough creative and original work to make the map copyrightable.

In Amsterdam v. Triangle Publications, 189 F.2d 104 106 (3rd Cir. 1951) the court held that the "necessary amount of creative work to justify the copyright of plaintiff's map had not been shown" although the plaintiff had complied with the copyright statutes and had received a registration certificate. In that case the plaintiff had studied other maps and spent considerable time and effort to assemble and preparthe information for publication, but the "actual original wor of surveying, calculating and investigating" done by plaintif was so negligible that it was discounted entirely. There is no evidence that Blackburn did even as much actual original work as Amsterdam.

The District Court's conclusion that Blackburn's map contains sufficient original and creative work to be copyrightable under the laws of the United States (R. 164) is clearly contrary to the law. Merely copying from three or more sources and compiling the information together on one piece of paper is not sufficient originality and creativity to make a map copyrightable as a matter of law.



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THE REPRODUCTION AND SALE OF COPIES OF THE MAP WITHOUT COPYRIGHT NOTICES DID NOT CONSTITUTE AN INFRINGEMENT OF THE COPYRIGHT BY THE COUNTY BECAUSE THE COUNTY WAS NOT OBLIGATED UNDER EITHER THE CONTRACT WITH BLACKBURN OR COPYRIGHT LAW TO AFFIX COPYRIGHT NOTICES TO EACH COPY.

At the commencement of the trial and prior to the taking of testimony the District Court held as a matter of law that the County was obligated to put Blackburn's copyright notice on every copy of the map reproduced by the Count under the contract with Blackburn. The Court stated "as long as the subject matter of the contract is a copyrighted map" and the County has the right to reproduce, it also has the obligation to put on the copyright notice (R.Tr. 12, 14). From this the Court concluded that the County had a positive duty under the contract and under section 10 of the Copyright Act to affix notices, that the County was bound by an implied covenant within the contract to affix copyright notices and that the breach of the implied covenants constituted an infringement of copyright so as to make the County liable for damages (R. 165).

The contract contains absolutely no mention of copyright notices, the only reference to copyright is contained in the statement that Blackburn is the proprietor of a map titled "Blackburn's Map of Ventura County, copyrighted compiled and published by O. V. Blackburn." Blackburn had never mentioned or discussed copyright notices with the County



until seven years after the contract was made (R. 163).

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The July 17, 1956, agreement gave the County of Ventura the unrestricted right to reproduce copies of the may for its own use and for sale to the public. In this regard three important factors deserve consideration. First, there was no restriction on the price which the County could charge This is important because the failure of Blackburn to place any control on the County's sales price permitted the situation to arise whereby the County could and in fact did under sell Blackburn by a wide margin, fifteen dollars (\$15) to seventy dollars (\$70) (R.Tr. 66). Second, there were no restrictions as to the sales area, the persons to whom the map could be sold or the period of time during which the County could reproduce and sell copies of the map. Thus Blackburn reserved no specific territory, customers or period of time for his own sales. Last and very significant, Blackburn mad no provision for payment of royalties on the maps sold by th County. This factor is crucial because since Blackburn was not entitled to royalties from the County for maps sold, the failure to affix copyright notices did not have the usual ef fect of depriving Blackburn of that natural source of income This feature distinguishes this case from the cases in which a promise to affix the notice may be implied by the courts.

Taking all factors together, Blackburn's sale of tunrestricted rights of reproduction, use and sale of copies of his map, reserving only the right to make his own copies



for sale seems to constitute an absolute abandonment of any copyright he might have had. This conclusion is especially compelling considering that he made no effort to update his own map since the sale to the County.

The District Court's conclusion that the County was obligated to affix copyright notices because the subject matter of the contract was a map in which Blackburn claimed a copyright and the implying of a promise to affix copyright notices to maps sold by the County are clearly contrary to the law.

A. The Court Erroneously Assumed That the County Was Obligated
to Affix the Copyright Notices Unless Blackburn Expressly
Waived His Copyright or Unless There Was Very Strong
Evidence That He Intended to Destroy It.

The District Court failed to distinguish between the concept of forfeiture of a copyright and the concept of abandonment or waiver of a copyright. The Court stated:

"If he sold you the right to print the map and sell it without a copyright then didn't he destroy his copyright? Well, I think that would be a harsh result, and certainly it would to me take very strong evidence to show that he intended to do that.

".... I think it comes down to
a question of whether or not the plaintiff
here waived his right to the copyright by
deliberately and purposely giving them
photostatic negatives for the purpose of
reproduction without having the copyright
notice on them." (Emphasis added. R.Tr.
15, 16.)



While there was "very strong evidence" in the con-2 tract with the County that Blackburn intended to destroy the 3 value of his copyright if not the copyright itself, the Court 4 refused even to consider that the copyright could be lost uns intentionally through Blackburn's inadvertence or neglect. 6 Although one of the conclusions of law states that Blackburn 7 has not forfeited his copyright (R. 165), the District Court gerroneously assumed that the copyright could be lost only if 9 Blackburn intended to destroy it.

The forfeiture of a copyright does not require any 11 evidence of a deliberate, purposeful or intentional surrender 12 or waiver of the copyright by the copyright proprietor. In 13 National Comics Publications v. Fawcett Publications, 191 F.2d 594, 598 (2d Cir. 1951), Judge Learned Hand explained the difference between the concepts in the following language:

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"It is of course true that the publication of a copyrightable 'work' puts that 'work' into the public domain except so far as it may be protected by copyright. That has been unquestioned law since 1774; and courts have often spoken of it as a 'dedication' by its 'author or proprietor.' That, however, is a misnomer, for 'dedication, 'like 'abandonment, 'presupposes an intentional surrender, which is in no sense necessary to the 'forfeiture' of a copyright. An author whose work is 'forfeited, need have had no such purpose, and ordinarily does not; it was indeed long doubtful whether he did 'forfeit' his rights by publication, and when it was settled that he did, the result was a consequence, imposed invitum upon him because of his failure to comply with the prescribed formalities." (Emphasis added.)



In discussing whether Admiral Rickover had forfeited his right to a copyright on certain speeches in <u>Public Affairs</u>

<u>Associates, Inc., v. Rickover</u>, 284 F.2d 262, 269 (D.C. Cir. 1960), the court said:

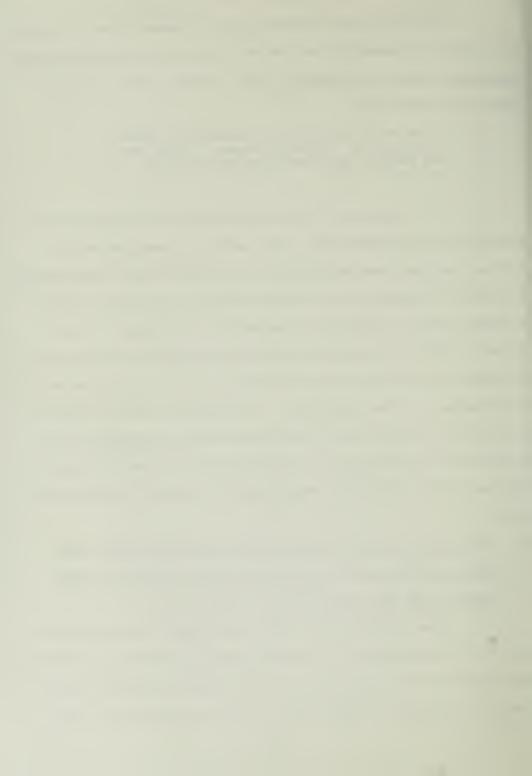
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"The word 'forfeit' is adopted to avoid 'dedication' or 'abandonment' which seem to suggest purposeful release to the public." (n.)

The failure of the District Court to recognize the concept of forfeiture led to the erroneous conclusion that unless Blackburn had deliberately, purposely and intentionally waived his copyright by an express waiver or by very strong evidence that he intended to waive it, the County was obligated to affix the copyright notices to copies of the map reproduced by the County and failure to do so constituted an infringement of the copyright. The District Court erred in refusing to consider that the carelessness or negligence of Blackburn in protecting his copyright could result in the forfeiture of the copyright even though he did not intend to destroy it.

B. The Copyright Act Does Not Impose Upon the County the
Duty or Obligation to Affix Copyright Notices to Each
Copy of the Map Reproduced by the County.

The District Court concluded that a positive duty exists on the part of the County under the contract and "under section 10 of the Copyright Act" to affix a notice of Blackburn's copyright on each copy of the map reproduced by the



County (R. 165). The conclusion was apparently based upon Blackburn's argument that the plain mandate of section 10 of the statute where it says, 'and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor" required the County to affix copyright notices even though the contract was silent as to such requirement. (R.Tr. 15.)

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This interpretation of section 10 of the Copyright Act is clearly erroneous. The section reads:

"Any person entitled thereto by this title may secure copyright for his work by publication thereof with the notice of copyright required by this title; and such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor . . . " 17 U.S.C. 10.

It is apparent from reading this section that the affixing of notice to each copy is merely a condition to securing the copyright. It is not a "plain mandate" to the proprietor and all the world that such notice shall be affixed to each copy. If it were, the copyright proprietor could never dedicate or abandon his copyright because every copy would have to contain the copyright notice by the "plain mandate of section 10". Thus the section does not state a mandatory duty but merely states a required condition for securing a copyright.

The effect of section 10 was explained by Judge Hand in the National Comics case, supra, 191 F.2d 594, 600:

"The question is whether the absence or



the imperfection of the notices on these 'strips' 'forfeited' their copyrights, when they were published in the 'syndicated' newspapers. The answer depends upon the terms of the contract of borrowing. Section 10 provides that the first publication of a 'work' with the 'required' notice secures the copyright; but it implies that a failure to affix the notice upon each copy, later published 'by authority of the copyright proprietor,' will 'forfeit' it; and such is the law."

Thus whether the County is required to affix copyright notices depends upon the terms of the contract with Blackburn. A mandatory duty to affix notices is not imposed by section 10 of the Copyright Act. Therefore, the District Court's conclusion that a positive duty exists on the part of the County under section 10 of the Copyright Act to affix a notice of Blackburn's copyright to each copy of the map reproduced by the County is clearly contrary to the law.

C. The Agreement Between Blackburn and the County Under Which
the County Reproduced Copies of the Map Does Not Impose
Upon the County the Duty or Obligation to Affix a Notice
of Blackburn's Copyright to Each Copy.

The only mention of copyright in the agreement between Blackburn and the County is contained in the first paragraph where it states:

"Whereas, O. V. Blackburn is the proprietor of a certain map of Ventura County, California, titled 'Blackburn's Map of Ventura County, copyrighted, compiled and published by O. V. Blackburn'. . . " (R. 5; P.Ex. 1.)

The written contract is a valid, legal and binding contract



and is the only and entire agreement between Blackburn and the County (R. 143). The contract states that Blackburn is the proprietor of a map; it does not state that he is the proprietor of a copyright.

The contract contains no provision for the payment of periodic royalties to Blackburn. The County's rights are unrestricted as to the prices to be charged, the geographic area, the duration of time and the persons to whom the County may sell. Thus, it is not the usual copyright license. But even if it were, the County is not obligated to affix copyright notices.

 The agreement is absolutely silent as to any duty or obligation to affix copyright notices to each copy of the map.

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The law with respect to the duty or obligation of a copyright licensee to affix copyright notices is clearly stated in the <u>National Comics</u> case, <u>supra</u>, 191 F.2d 594, 600-601:

"If [the copyright proprietor] . . . gave [the licensee] . . . an unconditional license to publish the 'strips,' their publication without the 'required' notice was 'by authority of the copyright proprietor,' and had the same effect upon the copyrights that similar publication by [the copyright proprietor] . . . would have had: it 'forfeited' them unless § 21 saved them. On the other hand if [the licensee] . . . promised to affix the 'required' notice upon the borrowed 'strips' -- as it did upon the 'strips' made under the contract -- the performance of that contract was a condition upon the license . . .



"[I]f [the copyright proprietor]
... exacted a promise from [the license]
... to affix the notice upon all copies which the newspaper published, performance of that promise became a condition upon that [the licensee's]
... license to publish ... But, if [the copyright proprietor] ... did not exact any such promise from the [licensee]
... to which it sent a 'mat,' it gave 'authority' to the [licensee]
... to publish as it chose, and the copyright was 'forfeited,' if the [licensee] ... failed to annex the 'required' notice."
(Emphasis added.)

Since Blackburn did not exact a promise from the County to affix the copyright notice to each copy he gave the County authority to publish as it chose, either with or without copyright notices affixed. The failure to affix copyright notices therefore was not an infringement of the copyright.

Whether the copyright was forfeited by Blackburn's failure to exact such a promise from the County depends upon whether section 21 of the Copyright Act is applicable to this situation. Holding that the failure of the County to affix notices does not constitute infringement of a copyright does not necessarily lead to the result that Blackburn's copyright has been forfeited.

The burden is upon the proprietor of the copyright to secure and protect his rights. If through neglect, inadvertence or design he fails to protect his rights and does not exact a promise from the licensee to affix his copyright notice to all copies made by the licensee, the licensee is not liable for damages for copyright infringement. There is no



evidence that Blackburn ever attempted to exact a promise from the County to affix notices. He never even mentioned copyright notices until seven years later. The County therefore is not liable for damages for infringement for failing to affix copyright notices.

 A promise to affix copyright notices will not be implied against the County so as to make the County liable for damages for infringement of copyright.

The District Court held that since the subject matter of the contract between Blackburn and the County was a copyrighted map, the County was bound by an implied covenant to put the copyright notices on each copy of the map reproduced by the County (R. 165; R.Tr. 12-13, 14).

In the <u>National Comics</u> case, <u>supra</u>, 191 F.2d 594, the District Court had held that the copyright owner had "abandoned" the copyrights by negligent omissions of copyright notices. The Circuit Court reversed the judgment and remanded the case for a determination as to whether the copyright owner had "forfeited" any of the copyrights by failing to exact a promise to affix copyright notices from the licensees or by failing to affix notices on the strips the owner had published. The contracts with the licensees were not before the Circuit Court so it could not determine whether the contracts contained a promise to affix notices



on the part of the licensees. However it was clear that the subject matter of the contracts with the licensees was copyrighted material. Therefore if the law implies a covenant to affix copyright notices by the licensee where the subject matter of the contract is copyrighted material, there would have been no need to remand the National Comics case to the District Court. Thus, the holding of the District Court that the County is bound by an implied covenant to affix copyright notices because the subject matter of the contract between Blackburn and the County is a copyrighted map is clearly erroneous.

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The cases in which the courts have found an implied covenant of good faith and fair dealing in a copyright license concerned literary material rather than maps. They involved disputes as to which of the various rights protected by a copyright were transferred in the license. In the leading case of Manners v. Morosco, 252 U.S. 317, 40 S.Ct. 335, 64 L.Ed. 590 (1920), the dispute was whether the license had transferred the motion picture rights in the play, "Peg O' My Heart." It was held that the contract transferred the stage play rights and did not include the movie rights. court implied a negative covenant of good faith and fair dealing to prevent the copyright owner from selling the movie rights to anyone else during the time that the licensee held the rights to produce the stage play. Kirke La Shelle Co. v. Paul Armstrong Co., 263 N.Y. 79, 188 N.E. 163 (N.Y.Ct.App.



1933), also involved the right to produce a stage play under a license and the right to produce a motion picture. Since the license contract was made before the invention of talking pictures the court applied an implied covenant of good faith and fair dealing to prevent the copyright owner from giving the talking movie rights to another. In Uproar Co. v. National Broadcasting Co., 81 F.2d 373 (1st Cir. 1936), a covenant of good faith and fair dealing was implied to prevent the author of radio scripts which had been prepared under a contract with an advertiser from using them in a way which would injure or interfere with the benefits to the advertiser under the contract.

Johnston v. 20th Century-Fox Film Corp., 82 Cal.

App.2d 796, 187 P.2d 474 (1947) was a dispute over an oral agreement granting a film corporation the right to the exclusive use of the title to a book, "Queen of the Flat Tops". In answer to the film company's contention that the contract was without consideration the court said the agreement carried with it implied obligations upon the part of the author to fully and adequately protect the film company's use of the title. 82 Cal.App.2d 796, 819; 187 P.2d 474, 488. Since the title had acquired a secondary meaning with a right of protection not dependent upon copyright, the author was not necessarily under an obligation to refrain from letting the book fall into the public domain. The film company bargained for the use of the title only and "cannot complain

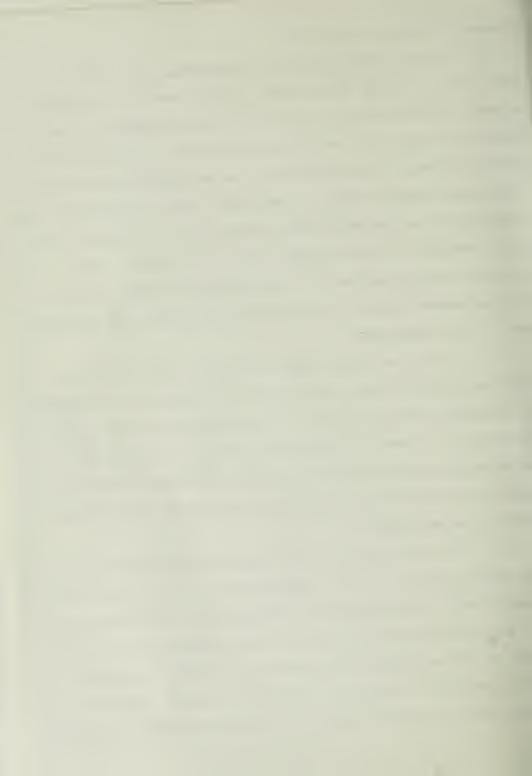


because it did not get more."

April Productions v. G. Schirmer, Inc., 308 N.Y.
366, 126 N.E. 2d 283 (N.Y.Ct.App. 1955), involved a contract
between songwriters and a music publishing company. It was
stated that where the parties to the contract were two music
publishing houses who both "well knew no property or literary
right would survive without compliance" with the copyright law,
copyrighting by the publishing company was a necessarily implied covenant of the agreement (126 N.E. 2d 288). The
covenant was not implied for the purpose of making the publishing company liable to the author for damages for infringement of the copyright.

In all of these implied covenant cases the copyright protected several other rights in addition to the right
to reproduce and sell copies of the copyrighted material to
the public. In none of them was a promise to affix copyright notices implied for the purpose of making a licensee
liable to the copyright proprietor for damages for infringement of the copyright.

The only reason for the court to construct a promise by the County to affix copyright notices is to make the County liable for damages for infringement. The County has not used and has not threatened to use any part of the copyright estate which was not granted to it in the agreement with Blackburn. The County has not threatened to use any movie rights, recording rights or any other rights protected



by a copyright. The County does not claim that it acquired the "right to destroy the copyright," if there is such a right in a "copyright." It is clear that the County did acquire the right to reproduce and sell copies of the map to the public at prices to be determined by the County (R. 5; P.Ex. 1). The agreement contains no restrictions as to the prices to be charged, the geographic area covered, or the duration of the right of the County to reproduce and sell copies of the map. It does not restrict the right of the County to transfer or assign all or part of the rights granted to the County to other persons. To the extent that the rights granted to the County may be termed the "right to destroy the value of the copyright", the County clearly was granted that right in the agreement with Blackburn. But there can be no doubt that Blackburn intentionally granted these rights to the County. Blackburn's sale to the County in 1956 of the right to reproduce and sell copies of the map certainly was an abandonment of his exclusive rights under the copyright. He gave up his monopoly and himself effectively destroyed the value of the copyright. The 1956 agreement is clear evidence of his intentional, purposeful and deliberate abandonment of his exclusive rights under the copyright, if not of the copyright itself.

If the copyright was destroyed, it was destroyed by Blackburn's inadvertence, design or neglect. As is clear from the National Comics case, supra, 191 F.2d 594, the



"forfeiture" of the copyright is imposed upon him <u>invitum</u>
because of his failure to exact a promise from the County to
affix copyright notices to each copy of the map unless the
omission was by accident or mistake and is excused by section
21 of the Copyright Act. The law does not construct an implied promise merely because one has failed to protect his
rights.

III

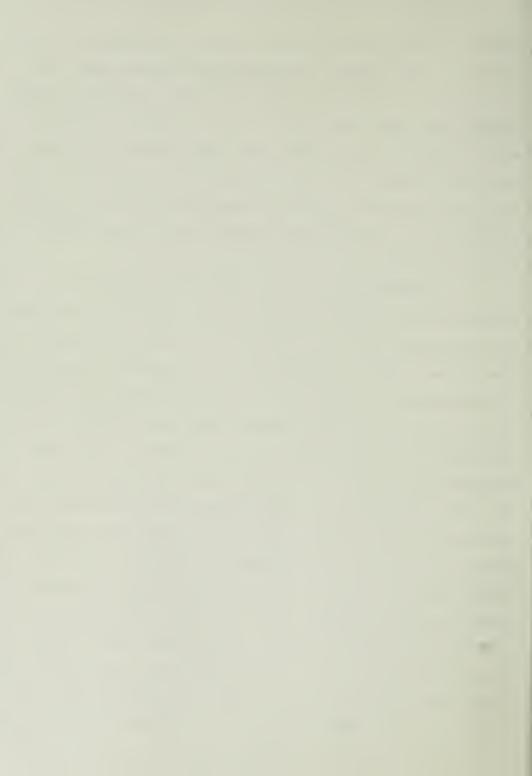
THE DISTRICT COURT AWARDED EXCESSIVE DAMAGES BY FAILING TO PROPERLY DETERMINE THE AMOUNT OF THE DAMAGE WHICH WAS CAUSED BY THE FAILURE OF THE COUNTY TO AFFIX COPYRIGHT NOTICES.

In a copyright infringement action the owner of the copyright is entitled to recover "such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement." 17 U.S.C. 101. He is not entitled to recover damages for any loss, injury or harm which was not caused by the infringement or any profits of the infringer which were not made from the infringement. The plaintiff may not claim as an item of actual damages the injury to his business which would have resulted from the defendant's authorized use of the work. See Consumers Union of the United States v. Hobart Mfg. Co., 189 F. Supp. 275 (SDNY 1960). Thus in assessing the damages to be recovered for copyright infringement the court must apportion the items of loss and profit so that the copyright proprietor recovers only the



damages or the profits resulting from the infringement of the defendant. See Sheldon v. Metro-Goldwyn Pictures Corp., 309 U.S. 390, 60 S.Ct. 681, 84 L.Ed. 825 (1940) and Orgel v. Clark Boardman Co., Ltd., 301 F.2d 119 (2d Cir. 1962). In lieu of actual damages, the court may award "such damages as to the Court shall appear to be just" assessed at the rate of \$1 for every infringing copy but not to exceed five thousand dollars (\$5,000) nor be less than two hundred fifty dollars (\$250).

Blackburn in open court waived any claim to recovery of profits which may have been made by the County from any infringement (R. 164; R.Tr. 49). The issue of damages then became a choice between the actual damages suffered due to infringement or the statutory damages allowed in lieu of actual damages. The "infringement" found was the failure of the County to affix copyright notices to copies of the map reproduced by the County from July 1956 until June 1964 (R. 165, 160). The district judge recognized that Blackburn was entitled to recover damages only to the extent that they were caused by the failure of the County to affix the copyright notice during the statutory period (R.Tr. 109). The Court, however, awarded damages in the full amount of Blackburn's estimate of the market value of the copyright prior to the time of entering the contract with the County less only the amount which the County had already paid Blackburn under the contract (R. 164; R.Tr. 111). It is clear that the District



Court did not consider what the value of the copyright would have been at the time of trial <u>but for</u> the failure of the County to affix copyright notices during the statutory period. The Court failed to distinguish between the damage caused by the absence of copyright notices during the three years preceding the filing of the complaint and the loss to Blackburn from other causes.

In answer to the County's argument that Blackburn's damages from the absence of copyright notices were less than fifteen thousand dollars (\$15,000), the District Court stated:

"The difficulty, counsel, in all of these cases is that you can make a very plausible argument that there is no damages, but you have got to have evidence, and the only evidence I have here is that the copyright was worth \$15,000.

"However I will admit this, it was reduced by \$1,900 which he got for that.

"So the judgment should be for \$13,100, it should be reduced by the \$1,900.

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"But the difficulty with your situation, as I say, counsel, is that it is very plausible to make that argument but I just don't have any evidence. I have found here that he was damaged and I have got to have something to hang my hat on insofar as evidence is concerned." (Emphasis added. R.Tr. 111-112.)

Thus, the District Court erroneously placed upon the County the burden of proving that the entire diminution in the value of the copyright was not caused by the failure of the County to affix copyright notices. But even if the



burden were on the County, the Court erroneously held that there was no evidence other than Blackburn's. There was sufficient evidence to establish that the entire loss of value was not caused by the absence of copyright notices from copies reproduced and sold by the County. The best and most reliable evidence of the value of the copyright is the amount which Blackburn accepted on July 17, 1956, for virtually all of the rights involved in the copyright of the map. As is shown by the above language from the transcript, the Court did not consider this evidence.

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A. The Primary Cause of the Loss in Value of the Copyright

Was the Fact that Blackburn on July 17, 1956, Sold to

the County the Right to Reproduce and Sell Copies of

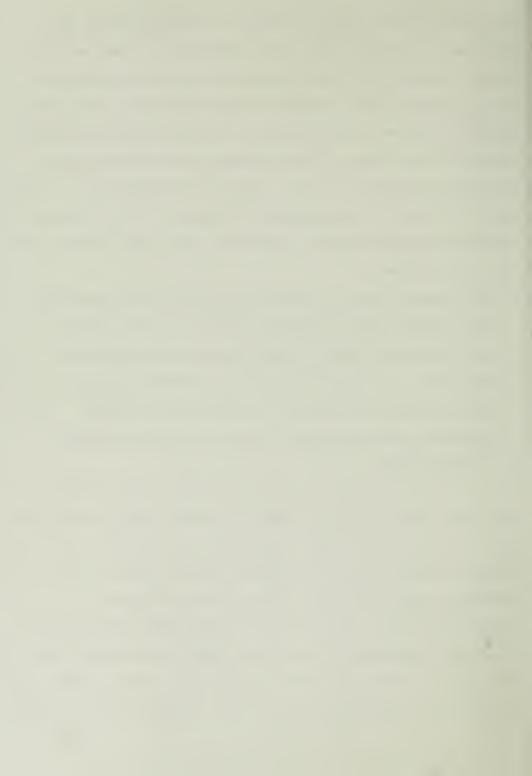
the Map to the Public Without any Restrictions as to

the Prices to be Charged, the Payment of Periodic

Royalties, the Geographic Territory, or the Duration

of the Rights.

The copyright in a map is nothing more than the exclusive right to print, reprint, publish, copy and vend the map. 17 U.S.C. 1(a). The "copyright" in a map does not include dramatic rights, performing rights, movie rights, recording rights and other rights normally involved in literary material. Thus any "copyright" which Blackburn had in the map was simply the exclusive right to reproduce and sell copies of the map. After selling the right to reproduce and duce and sell copies of the map to the County on July 17, 1956,



Blackburn no longer had the exclusive rights. He no longer had the monopoly granted him by the Copyright Act. He could not thereafter convey to anyone else the exclusive right to reproduce and sell copies of the map.

Whatever rights were left in Blackburn's "copyright" after July 17, 1956, were clearly of much less value than the rights which were involved in the copyright before July 17, 1956. The map is a map of Ventura County, the County is the major market area for the map. The County was given the right to reproduce and sell unlimited numbers of copies of the map to the public at prices to be determined by the County. The County was not required to make periodic royalty payments to Blackburn. The County could have given away copies of the map if it so desired. The County's rights were not restricted to any geographic area or period of time. The County was free to compete anywhere and anytime with Blackburn or anyone else to whom he may have sold the right to reproduce and sell copies of the map.

All that Blackburn had left of the "copyright" after July 17, 1956, was a non-exclusive right to reproduce and sell copies of the map. He had only the "right" to compete with the County for sales and that is all that he could have sold to anyone else. The "exclusive" rights of the "copyright" were split between Blackburn and the County after July 17, 1956. What Blackburn retained certainly was no more valuable than what he had sold to the County for one thousand nine



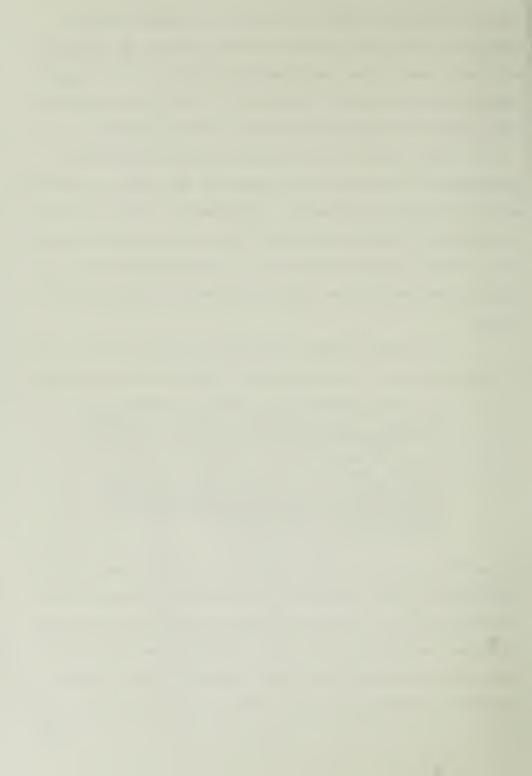
hundred dollars (\$1,900). In view of the fact that the County could and did reproduce and sell copies to the public at a much lower price than Blackburn (R.Tr. 66), the rights which Blackburn retained after July 17, 1956, were worth much less than one thousand nine hundred dollars (\$1,900).

The value of the copyright clearly was greatly diminished by the sale to the County of the right to reproduce and sell copies to the public. Blackburn's opinion that the copyright was "just as valuable" after the sale to the County (R.Tr. 74-75) is pure nonsense. It simply does not hold up under an analysis of the rights involved in the copyright of a map.

Blackburn himself unwittingly stated the real cause of the decrease in the value of the copyright when he said,

"I never developed any business because I had no chance to because I couldn't compete with the price they were selling it for . . . Previous to 1956 I was selling \$1,500 worth of maps a year. From then on it dropped down from \$450 to \$250 a year because they could buy this big scale from the County for less than I could sell the reduced scale that I depended on." (Emphasis added. R.Tr. 64.)

He testified that the County sold copies of the map for fifteen dollars (\$15) whereas he sold them for seventy dollars (\$70) (R.Tr. 66). When asked whether the value of the copyright was reduced by the sale of rights to the County, Blackburn answered, "not if they hadn't undersold me." (R.Tr. 74.) Blackburn recognized that the primary cause of his loss was



the competition of the County and not the failure of the County to affix copyright notices. This is also shown by the fact that the County's sales increased by fifty percent (50%) after the copyright notices were affixed (R.Tr. 91). The District Court however ignored the loss which was caused by the contract with the County and in effect rewrote the contract to give Blackburn the full amount of his estimate of the market value of the copyright.

It is clear that the District Court in awarding damages in the amount of thirteen thousand one hundred dollars (\$13,100) did not consider the great reduction in value caused by the contract with the County and did not apportion the damages. The District Court therefore did not follow the law and did not award only "such damages as the copyright proprietor may have suffered due to the infringement."

B. The Value of the Copyright was Greatly Decreased by the

Fact that the Copies of the Map Sold by the County Under

the Agreement of July 17, 1956, Were Current and Up to

Date Whereas the Copies Sold by Blackburn Were Not Up to

Date.

At the time of the trial nearly nine years had passed since Blackburn had sold the County the right to reproduce and sell copies of the map to the public. The County had corrected errors, added to, up-dated and kept current the information depicted on the copies of the map reproduced and sold by the County under the agreement with Blackburn (R. 144,



R.Tr. 92-93). Blackburn, however, did not keep the map current and up to date (R.Tr. 67-70) so the copies reproduced and sold by him did not contain current information.

The map involved covers the most populous area of one of the fastest growing counties in California. As the trial judge observed (R.Tr. 110) it is reasonable to assume that copies of the map are not bought "for antiques to put in a museum." The title insurance companies, public utilities and service corporations to whom the County sold copies of the map (R. 144) obviously were interested in buying copies of a current and up-to-date map.

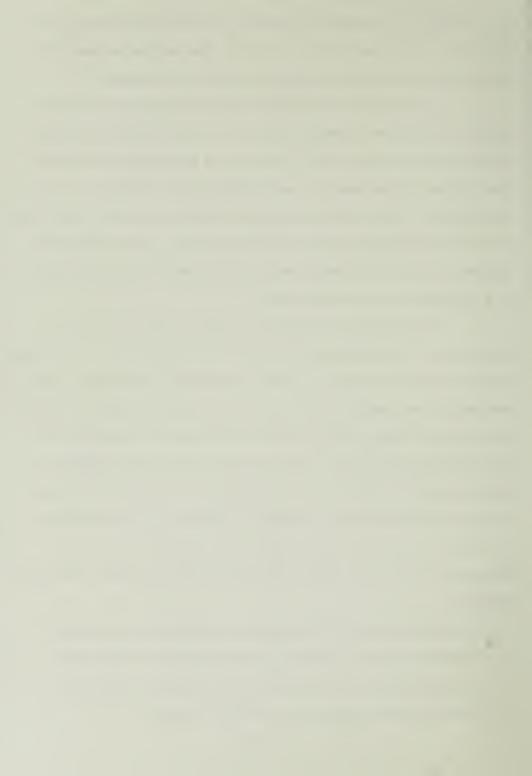
The District Court's conclusion that the work of the County in correcting and up-dating the map has no bearing on the issue of damages (R. 166) is clearly erroneous. In assessing the damages "due to the infringement" the District Court should have considered the diminution in the value of the copyright which was caused by the fact that a current and up-to-date version of the map was on the market in competition with Blackburn's copies of the map. The District Court did not properly ascertain the damages suffered by Blackburn due to the failure of the County to affix copyright notices.

C. The District Court Should Have Awarded the Statutory

Damages in Lieu of Actual Damages Because There Was

no Evidence of the Amount of Actual Damage Which Was

Caused by Any Infringement of the County.



Blackburn testified that his sales of copies of the map dropped from one thousand five hundred dollars (\$1.500) a year to four hundred fifty dollars (\$450) or two hundred fifty dollars (\$250) a year (R.Tr. 64). This would be an average loss of sales of one thousand one hundred fifty dollars (\$1,150) a year or a total of nine thousand two hundred dollars (\$9,200) from July 1956 until the County affixed copyright notices in June 1964 and a total of three thousand four hundred fifty dollars (\$3,450) for the three-year period of the statute of limitations. But there is no evidence as to what portion of the loss of sales was caused by the failure of the County to affix copyright notices. There was no evidence before the Court as to what Blackburn's loss of sales would have been if the County had affixed copyright notices to every copy. The County's sales increased by fifty percent (50%) after the copyright notices were affixed (R.Tr. 91), so it is obvious that the absence of copyright notices was not the sole cause if any cause at all, of Blackburn's loss of sales.

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Blackburn testified that the market value of the copyright went from fifteen thousand dollars (\$15,000) in 1956 to nothing at the time of the trial (R.Tr. 50). His witness Renie testified that the value of the copyright in 1956 was fifteen thousand dollars (\$15,000) to twenty thousand dollars (\$20,000) (R.Tr. 79) and that after the sale of the rights to the County and the sale of copies by the County



without copyright notices the copyright had no value. But neither Blackburn nor Renie testified as to what portion of the loss in value was caused by the failure of the County to affix copyright notices and what portion was caused by the sale of the rights to the County and other factors.

The best evidence of the value of the copyright in 1956 is the fact that Blackburn in 1956 sold the right to reproduce and sell copies to the public for one thousand nine hundred dollars (\$1,900). If the copyright really was worth fifteen thousand dollars (\$15,000) Blackburn surely would not have sold what is in effect all of the protected rights for only one thousand nine hundred dollars (\$1,900). But regardless of the amount of its market value there is no evidence of what portion of the loss in value was caused by the County's infringement.

The District Court apparently accepted as true the testimony that the copyright had lost all of its value. The Court held that Blackburn did not forfeit or waive his copyright and in fact still holds it (R. 164-166). Blackburn did not lose his copyright yet the Court awarded damages for the full claimed value of the copyright prior to the agreement of July 17, 1956, just as though the copyright had been lost.

Blackburn testified that since July 1956 he sold from four hundred fifty dollars (\$450) to two hundred fifty dollars (\$250) worth of copies of the map a year (R.Tr. 64).



At that rate he received approximately two thousand eight hundred dollars (\$2,800) from sales of copies of the map up to the time the County affixed copyright notices in June 1964. The County's sales increased by fifty percent (50%) after the copyright notices were affixed (R.Tr. 91) and Blackburn's sales continued to decrease (R.Tr. 66-67). Blackburn still has the copyright (R. 164-166; R.Tr. 109) and is able to make future sales and recover from anyone who may infringe his copyright. Thus the copyright clearly is not valueless now and the absence of copyright notices from copies sold by the County did not cause damage in the amount of thirteen thousand one hundred dollars (\$13,100).

Since there was no proof of the amount of actual damages caused by the absence of copyright notices, the District Court should have awarded statutory in lieu damages if any damages were to be awarded. There was evidence that the County had sold 96 complete copies of the map and 1,948 separate parts representing approximately 68 more complete copies of the map which did not contain the copyright notice in the three years before the complaint was filed (R. 144). There was sufficient basis for the Court to award damages at the rate of one dollar (\$1) per infringing copy not to exceed five thousand dollars (\$5,000) nor be less than two hundred fifty dollars (\$250).

By failing to properly determine the amount of damage caused by the failure of the Councy to affix copyright



notices during the statutory period, the District Court has awarded excessive damages.

CONCLUSION

For the reasons stated, it is respectfully submitted that the District Court's judgment should be reversed, and the cause remanded with instructions to dismiss the complaint and enter judgment granting appropriate relief to the County of Ventura, or in the alternative, with instructions to enter judgment granting Blackburn damages in an amount in the discretion of the trial court not to exceed five thousand dollars (\$5,000) nor be less than two hundred fifty dollars (\$250), or to grant other appropriate relief to which the County of Ventura may be entitled.

WOODRUFF J. DEEM
District Attorney

HERBERT L. ASHBY
Assistant District Attorney

KARL H. BERTELSEN
Deputy District Attorney

County of Ventura Courthouse Ventura, California

September 1965.

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AGREEMENT TO REPRODUCE MAP OF

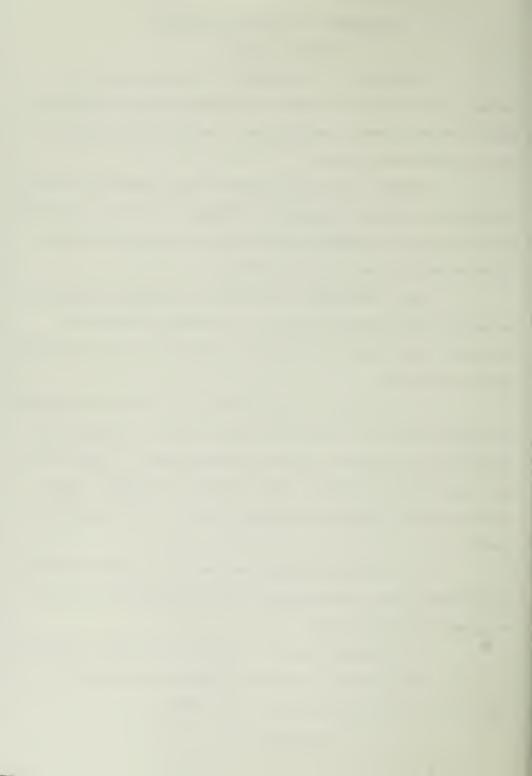
VENTURA COUNTY

WHEREAS, O. V. BLACKBURN is the proprietor of a certain map of Ventura County, California titled "Blackburn's Map of Ventura County, copyrighted, compiled and published by O. V. Blackburn", and

WHEREAS, it is the desire of the COUNTY OF VENTURA, California to obtain a duplicate tracing of said map, together with the right to reproduce said map for use by the County Surveyor and for sale to the public,

NOW, THEREFORE, the COUNTY OF VENTURA, California, hereafter called County, and O. V. BLACKBURN, 6400 West Boulevard, Los Angeles, California, hereafter called Blackburn, agree as follows:

- 1. Blackburn grants and sells to County the right to obtain duplicate tracings on linen from the photographic negatives of Blackburn's Map of Ventura County. County shall bear the expense of making such duplicate tracings. Upon completion said duplicate tracings shall be the property of County.
- 2. Blackburn grants and sells to County the right to reproduce from said duplicate tracings any and all maps necessary for County use.
- 3. Blackburn grants and sells to County the right to sell prints of said duplicate tracings to the public at such prices as may be determined by County.



1	4. County agrees to pay Blackburn the sum of					
2	one thousand nine hundred dollars (\$1,900) as full considera-					
3	tion for the rights herein granted and sold.					
4	5. Nothing contained in this agreement shall be					
5	deemed or construed to restrict the right of Blackburn to					
6	sell reproductions of Blackburn's Map of Ventura County to					
7	the public in Ventura County or elsewhere.					
8	DATED this 17th day of July, 1956.					
9.	COLLEGE AND A					
10	COUNTY OF VENTURA					
11	By s/ L. A. PRICE					
12	Chairman Board of Supervisors, County					
13	of Ventura, State of					
14	ATTEST:					
15	L. E. HALLOWELL, County Clerk					
16	of the County of Ventura and ex officio Clerk of the Board					
17	of Supervisors thereof					
18	By s/ SHIRLEY WEEKS					
19	By s/ SHIRLEY WEEKS Deputy Clerk					
20						
21	s/O.V.BLACKBURN					
22	s/O. V. BLACKBURN O. V. Blackburn					
23						

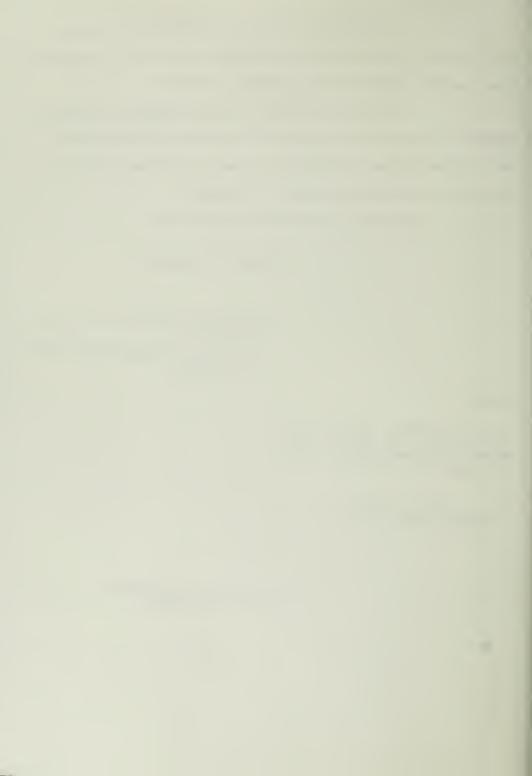


TABLE OF EXHIBITS

3	Exhibit	Copy (Record Page)	Identified (Transcript Page)	Received In Evidence (Transcript Page)
5	Plaintiff's 1 (Contract)	5-6	17	17
6	Plaintiff's 2-A - 2-H (Photographic Nega- tives of the map)		18	23
8	Plaintiff's 2-A-l - 2-H-8 (Duplicate tracings of the map)		39, 44	44
10	Plaintiff's 2-I (Index map)		40	42
11 12 13	Plaintiff's 3 (Certificate of Registration of Claim to Copyright)	74 - 75	51	51
14	Plaintiff's 4 (Printing order)	105	88	89
15 16	Plaintiff's 5 (Index map)		95	97
17 18	Defendant's B (Letter from Blackburn)	62	102	103
19 20	Defendant's C (Tracing of portion of the map)		100	101
21 22	Defendant's D (Blueprint of portion of the map)		100	101
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<u>CERTIFICATION</u>

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Karl H. Bertelsen

KARL H. BERTELSEN
Deputy District Attorney
County of Ventura
State of California



DECLARATION OF SERVICE BY MAIL

I, SOPHIA DeLESDERNIER, declare:

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I am a citizen of the United States, over 18 years of age, and not a party to the within cause; my business address is 501 Poli Street, Ventura, California; I served three copies of the attached brief for appellant on George R. Maury, attorney for appellee, by placing same in an envelope addressed as follows:

George R. Maury Suite 910 3440 Wilshire Los Angeles, California.

Said envelope was then sealed and deposited in the United States mail at Ventura, California, the county in which I am employed, on September 23, 1965, with the postage thereon fully prepaid;

I declare under penalty of perjury that the foregoing is true and correct.

Executed at Ventura, California, on September 23,

Suphia DeLesdernier
SOPHIA DeLESDERNIER

